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Case Digest

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CASE DIGEST

This *Case Digest* provides brief analysis of cases that represent current aspects of transnational law. The digest includes cases that apply established legal principles to new and different factual situations. The cases are grouped in topical categories, and references are given for further research.

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1. ADMIRALTY

STATE PORT AUTHORITY ACTING INCIDENT TO MARITIME CARRIAGE SUBJECT TO ADMIRALTY JURISDICTION IN DAMAGE SUIT

Plaintiffs sued to recover for damage to its cotton sheeting that allegedly occurred during shipment from Taiwan to South Carolina. Defendant, South Carolina State Ports Authority, moved to dismiss the suit against it because: (1) defendant, as an instrumentality of the state, was immune from suit under the 11th Amendment; (2) the court lacked subject matter jurisdiction; and (3) service of process was defective. Plaintiff contended that the suit was against a distinct business organization which is not protected by the 11th Amendment, and that defendant acted incidentally to maritime carriage and is thereby subject to admiralty jurisdiction. On the issue of proper service of process, plaintiff argued that defendant could be served in accordance with rules governing service on a foreign corporation. In denying the order of dismissal, the court considered whether the Authority was an "alter ego" of the state by inquiring into the fiscal relationship between the Authority and the state. The court upheld admiralty jurisdiction over defendant on the subject matter jurisdiction question because the damage may have occurred during the unloading of the cargo or the furnishing of wharf facilities. The court found personal jurisdiction proper because defendant was not entitled to governmental service; defendant was present in New York since it had a New

York sales office, and the manager of the office was authorized to accept service for defendant. *Significance*—The test for determining whether a state port authority is immune from suit under the 11th Amendment is whether or not an adverse judgment would affect the state treasury, making the state the real party in interest. *Doris Trading Corp. v. SS Union Enterprise*, 406 F. Supp. 1093 (S.D.N.Y. 1976).

MARINE INSURANCE PROVIDING COVERAGE OF LOSSES "ARISING FROM OR OCCURRING FROM" SPECIFIED CONDITIONS DOES NOT COVER LOSSES OCCURRING AFTER PERIOD OF COVERAGE DUE TO CONDITIONS WHICH INITIALLY AROSE DURING THE PERIOD OF COVERAGE

Plaintiffs successfully defended an earlier suit alleging plaintiffs' negligence in not removing or properly lighting a barge that had sunk in the Gulf of Mexico and was abandoned by plaintiffs after repeated attempts to refloat. In this suit plaintiffs sought recovery, under a protection and indemnity insurance contract, for attorneys' fees and expenses incurred in the defense of the earlier suit. The plaintiffs' insurance coverage on the sunken barge had lapsed prior to the collision giving rise to the cause of action in the earlier suit. The policy in question provided coverage "for any . . . loss arising from or occasioned by . . . any neglect or failure to raise, remove, or destroy [the wreck of an insured vessel]." The district court allowed recovery on the theory that the barge sank during the term of coverage and the insured's failure to remove the barge had largely occurred during that term. The court of appeals rejected the lower court's literal interpretation of the contract of insurance and held that the policy was not intended to cover losses sustained after the period of coverage. The court found that the policy read as a whole and in light of accepted actuarial principles clearly indicated that it was not intended to cover losses of any kind which occurred after the date of coverage. *Significance*—This case follows the growing trend in marine insurance cases to abandon the strict construction of policies when strict construction would be inconsistent with accepted actuarial principles. *Eagle Leasing Corporation v. Hartford Fire Ins. Co.*, ___ F.2d ___ (5th Cir. 1976).

FEDERAL COURT LACKS POWER UNDER SUITS IN ADMIRALTY ACT TO IMPOSE GOVERNMENTAL LIABILITY FOR HARM CAUSED BY FAILURE TO EXERCISE DISCRETIONARY FUNCTION

Parents instituted a wrongful death action against the United States under the Suits in Admiralty Act, 46 U.S.C. §§ 741-52,

alleging that the Coast Guard negligently caused their son's drowning in a sinking vessel. The Coast Guard had earlier found the vessel to be unsafe and revoked its "passenger-carrying" certificate. The Coast Guard took no further steps to insure compliance with decertification. Plaintiffs contended the Coast Guard had a duty to institute a follow-up safety program. The court held that institution of such a program was within the discretion of the Coast Guard and liability should not be imposed for failure to make a basic policy decision. Even though the Suits in Admiralty Act does not contain a discretionary function exception like the Federal Tort Claims Act, this court implied such an exception to avoid the "intolerable state of affairs" of continual judicial review of all legislative and administrative decisions affecting the public in maritime matters. The court rejected the holding in *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1970), that governmental immunities of the Federal Tort Claims Act are not to be carried over to the Suits in Admiralty Act and upheld its earlier assumption of a discretionary-function exemption in *Boston Edison Co. v. Great Lakes Dredge and Dock Co.*, 423 F.2d 891 (1st Cir. 1970). *Significance*—This case illustrates the First Circuit's willingness to imply a discretionary function exception in the Suits in Admiralty Act's proscription of governmental immunity. The split of authority remains unresolved. *Gercey v. United States*, 45 U.S.L.W. 2126 (1st Cir. 1976).

2. ALIEN'S RIGHTS

FAMILY RELATIONSHIP CAN BE SHOWN AS A MATTER OF FACT FOR IMMIGRATION PURPOSES WHERE APPLICABLE FOREIGN DOMESTIC LAW HOLDS MEANINGLESS THE CONCEPT OF LEGITIMACY

A lawful resident alien sought a declaratory judgment that the Board of Immigration Appeals erred in denying his petition for visa status for his alleged unmarried illegitimate son. The board denied the petition on the ground that plaintiff had not established that the son qualified as a child who is legitimate, legitimated under the law of his domicile, or illegitimate and claiming the relationship by virtue of his relationship to his mother under Section 101(b)(1) of the Immigration and Nationality Act. The law of the People's Republic of China, the domicile of the alleged son, provides that illegitimate children enjoy the same rights as legitimate children. Chinese law also provides that paternity can be legally established. Plaintiff contended that all children are considered legitimate under Chinese law. The court held that all children are

not automatically legitimate for immigration purposes since Chinese law recognizes the concept of legitimacy to the extent it is implicit in a paternity suit. But the concept of legitimacy appears to be otherwise meaningless. Because the purpose of the distinction between legitimate and illegitimate children in § 101(b)(1) is to assure the existence of the family relationship, plaintiff should be allowed to prove the relationship as a matter of fact where that distinction is meaningless under the law of the child's domicile. *Significance*—This case allows factual proof of the family relationship where the law of the child's domicile only implicitly gives meaning to the concept of legitimacy in a paternity suit. *Chin Lau v. Kiley*, 410 F. Supp. 221 (S.D.N.Y. 1976).

3. ANTITRUST

EXCLUSIVE EXPORT ARRANGEMENTS VIOLATE FEDERAL ANTITRUST LAWS WHEN COMBINED WITH SUCCESSFUL ATTEMPTS TO MONOPOLIZE

Pacific Coast Agricultural Export Association, a group of fresh fruit exporters, brought an antitrust suit against Sunkist Growers, Inc., a fruit growers cooperative, for monopolizing the export trade in oranges to Hong Kong. Sunkist had captured 70% of the Hong Kong market for American oranges by selling exclusively through Reliance Commercial Enterprises, Inc., and engaging in various other restrictive practices. Defendant claimed broad immunity from the antitrust laws as a grower cooperative under the Capper-Volstead Act. The district court found that defendant's status as a grower cooperative did not justify its exclusion of plaintiff from the Hong Kong market and ordered termination of the exclusive arrangement. The court of appeals affirmed, noting that Sunkist's control over the supply market had facilitated its control in the distribution market. *Significance*—This case indicates the international application of antitrust laws where American exporters are adversely affected by restrictive trade practices. *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975).

4. EUROPEAN ECONOMIC COMMUNITY

NATIONAL LAW UNREASONABLY RESTRICTING FREE FLOW OF GOODS BETWEEN COMMUNITY MEMBER STATES VIOLATES THE TREATY OF ROME

The Netherlands adopted a "Decree on Pharmaceutical Prepa-

rations" on January 22, 1970, requiring disclosure of relevant scientific data concerning a marketed drug. Centrafarm imported Valium into the Netherlands for sale but was unable to supply certain data concerning the drug because the manufacturer of the drug, Hoffmann-LaRoche, would not produce the necessary documents. Adriaan de Peijper, a director of Centrafarm, was charged with violating the decree. The Court of Justice ruled the decree unnecessarily restrictive and in violation of Article 30 of the Treaty of Rome because it permitted the manufacturer to exercise a monopoly by refusing to release scientific data. The Dutch decree was found unjustified because Valium was already being marketed in the Netherlands and the restraint on trade imposed by the decree was against Common Market policy. *Significance*—This decision reaffirms the Common Market policy of encouraging trade by reducing national boundaries as a barrier to the free flow of goods. *Ex parte Adriaan de Peijper*, 2 CCH COMM. MKT. REP. ¶8353 (1976).

5. INTERNATIONAL PATENT AND COPYRIGHT REGULATION

INVENTION NEED NOT BE PHYSICALLY LOCATED ENTIRELY WITHIN THE UNITED STATES TO BE PROTECTED BY THE UNITED STATES PATENT LAWS

Plaintiff brought an action against the United States for infringement of a patent on a sea and air navigation system. The accused system utilized three spaced radio transmitters, located in Hawaii, North Dakota, and Norway, which generated signals having a particular relationship. A computer-assisted radio receiver interpreted the phased signals in order to determine a position fix. Defendant noted that a patent is infringed only when an operable assembly of the entire claimed combination is "made or used" within the territorial limits of the United States, within the meaning of 35 U.S.C. § 271(a), and argued that since the third United States-owned station required by the combination was located on foreign soil, plaintiff's United States patent was not infringed. The court recognized that the accused system was not physically located entirely within the territorial United States, but held plaintiff's patent valid and infringed. The court found that the system was "made" in the United States, within the meaning of the statute, emphasizing that the system's signals were established, monitored, and synchronized from the United States, and that beneficial use occurred in the United States when a United States ship

used the system. *Significance*—This case holds that an invention need not be physically located entirely within the territorial United States in order to be protected by United States patent laws. *Decca v. United States*, 188 U.S.P.Q. (BNA) 167 (1976).

6. INTERNATIONAL TAXATION

A LOSS CARRYBACK REQUIRES COMPLETE RECALCULATION OF THE FOREIGN TAX CREDIT LIMITATION WHEN CURRENT LOSSES HAVE A COMMON FOREIGN SITUS WITH PRIOR INCOME

Plaintiff, a domestic corporation with foreign operations, sued for recovery of Internal Revenue Service assessments based on recalculation of a prior year's foreign tax credit limitation following refunds under net operating loss carryback applications. Plaintiff argued that the loss carryback has no bearing on the prior year's foreign tax credit limitation, contending that the loss carryback provision of the Internal Revenue Code of 1954 provides a deduction only from the prior year's gross income when gross income is derived by the accrual method of accounting. Plaintiff also argued that even if a recalculation of the foreign tax credit limitation is required, the loss carryback deductions must be allocated proportionally between foreign and domestic income sources, regardless of the geographic situs of the loss. The court reasoned that Congress intended the net operating loss carryback and the foreign tax credit limitation provisions to serve the purposes of ameliorating taxes (1) by an averaging to approximate a true business cycle, and (2) by providing limited relief from double taxation. The court interpreted *Lewyt Corp. v. Commissioner*, 349 U.S. 237 (1955), as holding that net operating losses do not affect a prior year's taxable income except as required by statute or valid regulation. The court interpreted and implied the word *credits* into the language of the regulation, relying on the persuasive authority of Treasury Regulation section 1.172-5(a)(3)(ii) (1975) as presumptively correct absent a showing of a variance from the statute. The court noted the stipulation that the prior income and the current loss had the same geographic situs, and indicated that loss carrybacks are allocated against the situs of the loss under Treas. Reg. 862(b). The court held that when taking advantage of the net operating loss carryback provision of the Internal Revenue Code with a foreign tax credit involved, the foreign tax credit limitation must be recomputed with losses from specific areas in subsequent years allocated against income from the same areas in prior years. *Significance*—This holding interprets Treas. Reg. section 1.172-

5(a)(3)(ii) (1975) to include the term *credits* among the adjustments required by a net operating loss carryback. *Motors Ins. Corp. v. United States*, 530 F.2d 864 (Ct. Cl. 1976).

7. JURISDICTION AND PROCEDURE

PRIOR JUDICIAL AUTHORIZATION IS REQUIRED BY FOURTH AMENDMENT FOR ELECTRONIC SURVEILLANCE BY ARMY OF UNITED STATES CITIZENS OR ORGANIZATIONS OVERSEAS

Plaintiffs, United States citizens and organizations residing in the Federal Republic of Germany and West Berlin, charged officials and personnel responsible for United States Army intelligence operations with electronic surveillance of plaintiffs without prior judicial authorization in violation of the fourth amendment. The court denied defendants' motion to dismiss, holding that, absent exigent circumstances, prior judicial authorization (in the form of a warrant based upon probable cause) is required by the fourth amendment for electronic surveillance of United States citizens or organizations located overseas when there is no evidence of collaboration with or action on behalf of a foreign power. *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), was found to provide controlling authority. In *Zweibon* the court held that compliance with warrant procedures is constitutionally required before wiretapping a domestic organization that is neither the agent of, nor acting in collaboration with, a foreign power, even when such surveillance is installed "under presidential directive in the name of foreign intelligence gathering" for national security reasons. *Significance*—Application of *Zweibon* expands the fourth amendment protections offered against illegal electronic surveillance by United States officials to include United States organizations and citizens overseas. *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976).

FUGITIVE'S FAILURE TO RETURN TO NATIVE COUNTRY AND INTENT TO AVOID PROSECUTION AMOUNTED TO CONSTRUCTIVE FLIGHT WHICH TOLLED STATUTE OF LIMITATIONS FOR EXTRADITION

Petitioner, former Judge Advocate General of the Indian Navy, left India in July 1966 with knowledge that he was being investigated for possible embezzlement. Petitioner came to the United States in 1971 where extradition proceedings were begun against petitioner in the United States in 1972. Petitioner contended that since the last alleged act of embezzlement occurred in September 1961, the five year statute of limitations of 18 U.S.C. § 3282 invali-

dated the extradition proceedings. The United States magistrate and the district court concluded that petitioner's failure to return to India constituted "constructive flight" to avoid prosecution, and therefore the statute of limitations was tolled as provided in 18 U.S.C. § 3290. The court of appeals held that the concept of "constructive flight" was a proper interpretation of the scope of § 3290. The court reasoned that petitioner's decision not to return to his native country reflected an intent to absent himself from Indian jurisdiction to avoid prosecution, even though it might not be shown that petitioner had a specific intent to flee prosecution when he left India in 1966. *Significance*—This case approves the concept of "constructive flight" for purposes of tolling a statute of limitations. *Jhirad v. Ferrandina*, 536 F.2d 478 (2d Cir. 1976).

UNITED STATES AGREEMENT TO FOREIGN COURT'S EXTRADITION DECREE LIMITING EXTRADITABLE CHARGES TO OFFENSES THAT OCCURRED WITHIN A CERTAIN TIME PERIOD DOES NOT BAR USE OF EVIDENCE OF DEFENDANT'S PRIOR ACTS AT DEFENDANT'S TRIAL

Defendant was indicted in the United States for a conspiracy to sell narcotics between January 1, 1968, and April 30, 1971, and for eleven subsequent overt acts. The United States sought to have defendant extradited from Spain. The Spanish High Court, however, noted that prior to Spain's September 3, 1970, signing of the Geneva Convention of 1936 for the Suppression of Illicit Traffic in Dangerous Drugs, Spain and the United States had no extradition treaty covering narcotics smuggling. Thus, the High Court issued a decree conditioning defendant's extradition on a promise by the United States to prosecute defendant only for those offenses that occurred between September 3, 1970, and April 30, 1971. Nine of defendant's overt acts occurred before September 3, 1970. The United States agreed, and defendant was extradited. Defendant contended at pretrial hearing that the Spanish decree precluded admission into evidence of the pre-September 3, 1970, alleged offenses at his trial for post-September 3, 1970, offenses. The United States, however, contended that the decree did not prohibit use of any evidence of the prior offenses at defendant's trial. The district court held for defendant, but the court of appeals reversed, noting that to allow the Spanish decree to exclude such proof would be contrary both to international law, which precludes an asylum state from delimiting the evidentiary rules of the requesting state, and contrary to United States rules of evidence, which allow use of evidence of prior acts in such cases. In particular, the court struck down defendant's reliance on the interna-

tional law doctrine of specialty, noting that the doctrine has not been extended to permit foreign intrusion into the evidentiary rules of the requesting state. Lastly, the court observed that the Spanish court merely forbade defendant's prosecution for pre-September 3, 1970, offenses, but did not restrict United States rules of evidence. *Significance*—Neither general international law nor the specialty doctrine permit a foreign court to restrict the evidentiary or procedural rules of the state requesting extradition, although a foreign court's extradition decree may restrict the offenses for which the requesting state can prosecute the defendant. *United States v. Flores*, 538 F.2d 939 (2d Cir. 1976).

